UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SHARON GLASSBROOK,

Plaintiff,

v

ROSE ACCEPTANCE, INC., et al,

Defendants.
_____/

Case No. 13-CV-10152
U.S. Magistrate Judge
Michael J. Hluchaniuk
Flint, Michigan
October 15, 2014
9:02 a.m.

Ordered By: THOMAS SCHEHR, ESQ.

MOTION HEARING

APPEARANCES:

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Proceedings recorded by electronic sound recording, transcript produced by transcription service.

(Court in Session)

THE CLERK: All rise. The United States District Court for the Eastern District of Michigan is now in session. The Honorable Michael Hluchaniuk, United States Magistrate Judge presiding.

THE COURT: You may be seated.

THE COURT: Hello.

MR. HONIGMAN: Hello, Your Honor, it's Dave Honigman.

THE COURT: Good morning, Mr. Honigman.

MR. HONIGMAN: Good morning.

THE COURT: We're here in Court today and we will call the case and then I'll ask for the appearances of counsel.

THE CLERK: The Court will now hear civil case number 13-CV-10152, Sharon Glassbrook versus Rose Acceptance, Incorporated, et al.

THE COURT: Could I please have the appearances of counsel for our record this morning first for the plaintiff.

MR. HONIGMAN: This is Dave Honigman, Your Honor, on behalf of the plaintiff.

THE COURT: All right. And for the defendant.

MR. SCHEHR: Good morning, Your Honor. Thomas Schehr on behalf of the defendants. And with me today are Brian Titus and Allen -- excuse me, Adam Holland from FNBA.

THE COURT: All right. Good morning again to all of you. We are here to take up a hearing on two motions that are pending before us this morning. Those being docket number 77 which is the defendants' motion for summary judgment, and docket number 83 which is the plaintiff's motion to amend.

The -- I think it's probably best just to reflect on the record today that plaintiff's counsel, Mr. Honigman is not present in the courtroom, he is on the phone at his request. This matter had been scheduled for a personal appearance and Mr. Honigman has requested that he be allowed to participate by phone. It's perfectly acceptable and that's certainly taking place today.

So let's start with the defendants' motion for summary judgment. And Mr. Schehr if you're ready you may proceed with your argument.

MR. SCHEHR: Thank you, Your Honor. Should I go to the podium?

THE COURT: Yes, please.

MR. SCHEHR: Thank you.

THE COURT: I take it, Mr. Honigman, that you're able to hear us all right?

MR. HONIGMAN: I am. I can hear everything fine thanks, Your Honor.

THE COURT: Good.

MR. SCHEHR: Your Honor, summary judgment in favor

of the defendants is appropriate because there's no genuine issue of material fact over whether the defendants called the plaintiff's SafeLink phone utilizing the TouchStar dialer.

And the question before the Court today is whether the plaintiff has satisfied her burden under Rule 56 of establishing a genuine issue for trial. I would ask the Court to view the record through the lens set forth by Rule 56.

So let's take a look at the record, Your Honor. The defendants utilized three methods for calling during the relevant time frame. The first is manual dialing, the second is click to dial, and the third is the TouchStar dialer.

Neither manual dialing nor click to dial are alleged to be an automatic telephone dialing system within the meaning of the Telephone Consumer Protection Act. Nor are manual dialing or click to dial alleged to employ a pre-recorded message.

The question before the Court is whether or not plaintiff was called utilizing the TouchStar dialer. The TouchStar dialer is the only thing that is alleged to be an ATDS under the statute. We certainly dispute that that is the case. That if the TouchStar dialer did not call the plaintiff and that's not an issue that the Court needs to address.

In addition the TouchStar dialer is the only technology employed by defendants that is capable of utilizing a pre-recorded message. So again the question before the Court is whether the TouchStar dialer was used to call plaintiff's

SafeLink phone.

Your Honor, we have filed a detailed motion for summary judgment. I don't intend to take the Court all the way back through it, but I do want to highlight two exhibits that I think are very important and frankly dispositive of the issue.

The first -- the first is Exhibit L to our motion for summary judgment. This is the call log showing all calls from defendants to the SafeLink phone owned by the plaintiff.

The record is undisputed that TouchStar is plugged into a specific port on FNBA's phone system and it's known as a TS line. And it's undisputed that if TouchStar was used then under the collector column on Exhibit L there would be a notation TS. This is the universe of calls to the SafeLink phone and I can represent to the Court that there is not one TS designation under the collector column which means that TouchStar did not call the plaintiff.

THE COURT: These are your records -- your client's records?

MR. SCHEHR: These are the defendants' records showing the universe of calls made to the plaintiff's SafeLink phone, yes, Your Honor.

THE COURT: Okay.

MR. SCHEHR: The second exhibit that I'd like to direct the Court's attention to is Exhibit J. This is a declaration of Craig Bowman who is the head of IT of the

defendants. And specifically I'd like to direct the Court's attention to Exhibit 1 to Mr. Bowman's declaration.

THE COURT: Unfortunately my computer doesn't seem to be working right this morning so I'm not able to access those. If you can give me just a second, Mr. Schehr, I apologize. I'm going to try to reboot and see if that will -- why don't you go ahead with your argument, Mr. Schehr. I'll just have to make do. Exhibit J.

MR. SCHEHR: Exhibit J and specifically Exhibit 1 to Exhibit J is a query of the TouchStar dialer. TouchStar only works, Your Honor, when phone numbers are uploaded to it. And TouchStar keeps track of every phone number that has ever been called. And there hasn't been any number that's been deleted from TouchStar.

We ran a query of the TouchStar data base. This Exhibit 1 is the result of that query. And had the 1158 number, the SafeLink number that's the subject of this case been called by TouchStar, then there would have been a result yielded on this query.

Your Honor, you can see that there are no results under any of the columns and as such the TouchStar dialer was not used to call plaintiff's SafeLink phone. No results, the number was never in TouchStar and TouchStar never called the plaintiff's SafeLink phone.

THE COURT: Mr. Schehr, does that seem unusual to

you? That this is a means through which contact with people who -- who your client's business would normally contact, this is a device that would be normally used, but yet this particular phone was not called by -- by this system which apparently is used on a regular basis by your client. How would you explain the absence of contact with that number?

MR. SCHEHR: It's not unusual in the least, Your Honor. The client has a detailed system for maintaining phone records and only numbers that are eligible to be called by the dialer are input into the dialer.

So cell phone numbers are not placed into the dialer unless there is consent to call that cell phone number. So it is not unusual at all that a cell phone number is not placed into the dialer.

THE COURT: In all instances is it readily known that a -- a particular number is a cell phone number versus a land line number? I mean if -- if the number came to the attention of your client in the normal course of business and there was an attempt to contact somebody who owed a debt, would they be able to recognize just by looking at the number that this was a cell phone versus a land line?

MR. SCHEHR: Not necessarily, Your Honor, no. And that number would never have been put into the dialer. The client has a process for uploading information into the dialer. There is a separate query that is done and only

numbers that are eligible -- that the client has designated as eligible to be called by the dialer, i.e. a land line, or a cell phone, where the borrower has given consent are placed into the dialer.

THE COURT: But I guess my question is, if -- if somebody who was uploading numbers into the system for purposes of contacting someone, was simply provided with a phone number however that number may have been acquired, would it be obvious from the -- the appearance of the number that it was a cell phone number? Could someone have done this by accident?

MR. SCHEHR: The answer to the question is, Your Honor, no, it is not obvious from a telephone number in and of itself whether or not it is a cell phone number. And what I'm saying is, that as a result that number never would have been uploaded into the dialer because only numbers that are eligible to be called by the dialer are uploaded into the dialer.

THE COURT: But any land line would be eligible, right?

MR. SCHEHR: I -- I believe that is a fair statement, Your Honor.

THE COURT: And therefore if someone perhaps by mistake believed that a number was a land line versus a cell phone number could not that person have uploaded this number

into the system?

MR. SCHEHR: Not here, Your Honor because we've queried the dialer and the dialer has never made a call to the number at issue. So while it's hypothetically possible, that there's human error at some point, I suppose that's possible in any case.

In this particular case with Sharon Glassbrook, it is technologically impossible for her to have received a call from the TouchStar dialer. Our phone records establish that and the query of the dialer establishes that.

THE COURT: Okay.

MR. SCHEHR: And there's no evidence to the contrary, Your Honor.

THE COURT: Okay. I understand your argument.

MR. SCHEHR: Okay. We produced five witnesses to testify about these records that I've just showed to the Court. All have confirmed through their testimony what I have explained to the Court. We've produced additional records all of which supports the proposition, the undisputed fact, that the TouchStar dialer was to used to call Mrs. Glassbrook.

Plaintiff argued vigorously, Your Honor, at the scheduling conference back on March 10th that they wanted a right to inspect our system. Your Honor may recall that the plaintiff has said the defendants' phone records would establish whether or not she has a claim under the TCPA. And

quite frankly we agree with that.

We -- the -- the Court in the scheduling order allowed the plaintiff the right to come in and inspect our system and the plaintiff did not avail themselves of that right. Had they done so, they would have simply confirmed what we have offered to the Court which is a query of the dialer which shows that the SafeLink phone was never called by the dialer.

Your Honor, all of that is undisputed. That's an important point to know. While it's hypothetically possible that a human error was made at some point and somebody could have received a call on their cell phone by the dialer without their consent is not the issue before the Court.

The issue before the Court is whether Sharon Glassbrook was called by the dialer. And under Rule 56 she has a burden in responding to a summary judgment motion. The Masushita case from the United States Supreme Court I think is instructive on her burden.

That specific case says that she has an obligation to come forth with more than a scintilla of evidence. She's got to show more than a metaphysical doubt as to the records offered by the defendant.

And that case also says, "if the factual context renders the plaintiff's claim implausible, then the plaintiff must come forward with more persuasive evidence to support her claim than would otherwise be necessary".

So she has a burden of coming forward with evidence to show that there is a genuine issue for trial. So let's look at what she has come up with in response to our motion for summary judgment to determine whether she's met a burden.

The first Your Honor, is vague testimony she's offered that essentially repeats the allegations in the complaint. She's confirmed she has no documents relating to any of those calls. She says SafeLink doesn't maintain any records containing those calls. She doesn't recall any specific calls. She doesn't know when the calls were made. Her testimony is very vague about having received a pre-recorded message from the defendants.

THE COURT: She -- she does seem, and I'll ask you this, whether you accept the notion that she seems confident that such calls were made, although she can't identify the specific dates, times that they were made on. Would you agree with that?

MR. SCHEHR: Well, she -- she does state that she received a pre-recorded message, I believe that's Your Honor's question. But let's -- let's take a look at the testimony that she has on what pre-recorded message she claims to have received.

What she claims is that she would pick up the phone, there would be a pause, and that she would hear please hold for an important message from First National Bank. And then

there would be a pause for seven or eight minutes until a credit service rep from First National Bank actually came on the line and that would eat up her scarce minutes on her SafeLink phone program.

That's the gist of the complaint. Please hold for an important message. Then she has to wait and that ate up her minutes.

Now we've established and the record is undisputed that our system is technologically incapable of doing that. The only time the TouchStar dialer can employ a pre-recorded message is on voice mail. There is a voice mail prompt, you hear a beep, or you hear an answering machine beep. Then and only then when the dialer was turned on to leave a pre-recorded message, would there be a pre-recorded message.

That pre-recorded message has been produced to the plaintiff and it's also been transcribed for the Court. And it's a very basic message. It just says, this is so and so from First National Bank, please call me at the following number and that's it.

It never said, please hold for an important message and then would wait until a credit service rep was available to take the call. Moreover, Your Honor, if there was a call by the dialer and a credit service rep was unavailable, technology would simply drop the call. If there was no credit service rep ready to talk to the borrower when she picked up

the phone, the call would be dropped.

We do not have the technology, it was not employed to say on a pre-recorded message, please hold for an important message from FNBA while the borrower waited for a credit service rep to be available.

THE COURT: Okay.

MR. SCHEHR: Okay. And, Your Honor, I think there's been a general recognition throughout this case by counsel to the plaintiff that a simple recitation of what's in the complaint by the plaintiff in an affidavit or in -- in deposition testimony is insufficient to get the case to trial.

And what I want to focus the Court's attention on is the fact that Mr. Honigman and Mr. Campbell have said all along that the defendants' records would establish whether the dialer called the plaintiff. The defendants' records establish that the dialer did not call the plaintiff and as a result there was not enough to overcome summary judgment under Rule 56. So the vague testimony by itself about any support in the documents or the records is insufficient to withstand summary judgment.

Let's look at what else the defendants have offered -- I'm sorry, the plaintiff has offered to withstand summary judgment. The first is a 56 affidavit, Rule 56 affidavit that's been signed by Mr. Honigman.

I read that as an addition that on the record as it

stands that there is no basis to oppose summary judgment under Rule 56. What Mr. Honigman asks for is a continuance of discovery to try to find some additional records that theoretically could cast doubt on the undisputed record that we have before the Court.

Your Honor, it is not clear why whatever discovery that they seek now was not conducted during the discovery period. In the very first requests for documents and interrogatories that we received from the plaintiff, we were asked to identify our service providers, telephone service providers. We did so in a timely fashion. That was disclosed clearly and unambiguously.

I believe the response date was April 7th. We produced that information. The plaintiffs waited about a month, I believe they served their subpoenas on May 6th or May 7th to the telephone service providers.

But in any event they did do that. Whether or not they followed up is not clear to us. We have no information from the telephone service providers that the plaintiff obtained in response to the subpoena other than some AT&T records which they gave us at the close of discovery.

But it's clear that if the plaintiff wanted information they had the ability to do that through the subpoena yet didn't follow up. We had a motion to compel hearing before Your Honor on June 25th of 2014. There was no request to

extend discovery during that motion hearing or as part of their motion to compel.

The only time we are now hearing of a request to extend discovery is after they read our dispositive motion. Well, we laid out, the records are undisputed, that she was not called by the TouchStar dialer.

The Court has discretion in terms of what to do with the 56 affidavit. We laid out the factors that the 6th Circuit asked the Court to consider in our brief and I'm not going to through those once again unless the Court has questions. But the bottom line is they had the opportunity to do whatever discovery they wanted during the discovery period, they did not do so. They did not ask for a continuance of discovery during the discovery period. And it is inappropriate to ask for a continuance of discovery after the close of discovery and after we filed a dispositive motion laying out what we've said from day one of this case which is she was not called by the TouchStar dialer.

THE COURT: All right.

MR. SCHEHR: And then the last thing that they offered in an effort to respond to our motion for summary judgment is the Renshaws. Now I know adding them is the subject of a separate motion and we can deal with that separately.

But I think it's important to note a couple things.

Number one, the Renshaws do not corroborate Sharon Glassbrook's testimony. They've never met Sharon Glassbrook, they know nothing about any calls that were made to her. They have no records relating to any calls made to Sharon Glassbrook. Whether the Renshaws had their own claim will rise or fall on its own merit. It has nothing to do with Sharon Glassbrook's claim or lack thereof.

Second, it appears from a review of the briefing both on the motion for summary judgment and on the motion for leave to amend, that the Renshaws are being added here, or they want to add them in an effort simply to conduct more discovery.

I direct the Court's attention to the reply brief that the plaintiff filed in support of their motion for leave to amend Page 2 in which they state that the Magistrate didn't issue an order granting in part and denying in part plaintiff's motion to compel the production of critical documents that might make the Renshaws' participation less necessary until June 25th.

And then they say they contacted us about whether we'd produce documents after the close of discovery. And we said we've produced everything we have. And then they say in their brief at the bottom of Page 2, it was at that point that the balance tipped decisively in favor of adding the Renshaws even though that would probably mean another expensive heavily contested motion, briefing, and hearing.

So the Renshaws are being sought -- they're seeking to add the Renshaws to the Glassbrook case in an effort simply to conduct more discovery. The Renshaws' claims have nothing to do with Sharon Glassbrook's claim and we would ask the Court to decide Sharon Glassbrook's claim on its own merit as opposed to anything that the Renshaws may have to say about calls that they received from FNBA.

THE COURT: It -- it would be fair to say, would it not, Mr. Schehr, that at face value anyway the Renshaws provided information that was similar to Ms. Glassbrook, that is that they alleged that there was automatic dialers, messages left, those kinds of things, which are generally consistent with the description that Ms. Glassbrook gave about those events?

MR. SCHEHR: I -- I don't think that's accurate, Your Honor. Pre-recorded -- I guess it's fair to say that they allege they received a pre-recorded message and if Your Honor doesn't consider anything other than that, then yes, that is similar.

But if you take even more than a superficial look at what they said, you will realize that the pre-recorded message that they say they received is markedly different than what Sharon Glassbrook says she received. They say they picked up the phone and they said -- and FNBA said, please hold for an important message. Press 1 if you are the borrower, press 2

if you are not the borrower which is a completely separate and distinct set of facts relating to a pre-recorded message that Sharon Glassbrook said -- never said existed.

There was no press 1 or press 2 that Sharon Glassbrook offered as part of the pre-recorded message. So they're claiming something completely different.

THE COURT: Right, the wording was different, but --

MR. SCHEHR: Our system is technologically incapable of doing that and we'll deal with that when the Renshaws file their own complaint. But the bottom line is, their message doesn't really mesh with Sharon Glassbrook's message, it's completely different.

THE COURT: Okay.

MR. SCHEHR: Okay.

THE COURT: I think I understand.

MR. SCHEHR: Okay. So the Court should consider the burden that the plaintiff has in an effort to respond to a summary judgment motion.

We've cited the cases from the Eastern District of Michigan, Miller, Toma, and Pugliese. And we think that the Courts in those cases are -- have rendered decisions that are really instructive here.

The Courts in those cases say there needs to be more than self serving affidavit or testimony in an effort to respond to undisputed records offered by the defendants relating to calls

that were alleged to have been made. And the Courts in each of those cases granted summary judgment because there was nothing more than vague statement about calls being made.

THE COURT: But at least in -- in some of those cases and maybe I'm thinking about Pugliese that some of the documents that were presented in favor of the -- the motion were -- were not the parties' documents, were they not? They were actually phone records or the plaintiff's own documents? And is -- is that a distinguishing factor here in your view?

MR. SCHEHR: Your Honor, I don't -- was not counsel of record in that case. I don't know anything about the case other than what the Court said in its -- in its opinion.

THE COURT: And I don't either. I'm just relying on what it said in the opinion. But it seemed to me that -- that at least in the Pugliese case that there was the -- the concept that some of the records that the -- that the plaintiff was using were inconsistent with plaintiff's records and they were -- I'm -- I'm sorry, the plaintiff's records or records that they were relying on were inconsistent with the statements that the plaintiff gave.

And so the Court based its decision in terms of the overall evidence that was presented in -- in support of the motion and in response to the motion, that they weren't relying solely on the defendant's records to establish the -- the factual basis of the decision.

And so -- so there wasn't this -- this concept that it's your records that form the basis as opposed to a non-party like the phone company or something of that nature to -- to the extent that might be a distinguishing factor.

MR. SCHEHR: Well, I -- I don't think it is, Your Honor. Again, there is a burden that the plaintiff has after having an opportunity for discovery to come forth with specific evidence.

There is nothing here that I've seen. They have some phone records from AT&T. I'm not sure what the import of them is. It doesn't establish at all that the dialer was utilized to call Mrs. Glassbrook whatsoever. But they've had the opportunity to -- to issue subpoenas and in fact have issued subpoenas to the phone companies in an effort to get the records. Apparently there's nothing in those records that would support their claim because Mr. Honigman otherwise would not have filed his Rule 56 affidavit.

The other thing I want to point out and -- and perhaps this is -- this is important in light of the Court's questions, these call detail records, whatever the definition of -- of those is, Mr. Honigman has made a big deal about the fact that we haven't identified what phone numbers we used to call the plaintiff.

The fact of the matter is in any given month there is only one phone number that is used by the defendants to call

anybody regardless of which telephone dialing method is used. So the phone records are not going to show anything because there is a specific number that was utilized to call the plaintiff. That's undisputed, Your Honor.

THE COURT: Was it the same throughout this period of time, or did it vary from month to month?

MR. SCHEHR: Was what, the phone number?

THE COURT: Right. I mean I thought you said in any given month there was only one number. Does that suggest that it --

MR. SCHEHR: That's --

THE COURT: -- varies -- that number varies from month to month or --

MR. SCHEHR: I believe the number could vary. I don't know that we had any control over it. Bottom line is that in any given month this is a declaration that's undisputed in the record. In any given month there was simply one number that was ascribed by the phone company to any outgoing calls made by the defendants. And as a result any phone records are not going to establish whether or not the TouchStar dialer was utilized to call plaintiff.

THE COURT: Telephone company records.

MR. SCHEHR: Correct.

THE COURT: Okay. All right. I'll give you an opportunity for rebuttal after Mr. Honigman has completed his

comments.

MR. SCHEHR: Thank you, Your Honor.

THE COURT: Mr. Honigman.

MR. HONIGMAN: Thank you, Your Honor. Well, it's -- it's our view of course that there is a genuine dispute of material fact about whether or not the defendants called or attempted to call and send text messages to any of plaintiff's cell phone numbers using an automatic telephone dialing system and pre-recorded messages without her consent.

We believe that you should deny defendants' motion for summary judgment since all the material facts are substantially disputed based on the testimony and documents that have already been produced and order defendants to produce the outgoing calling records defendants used to attempt to contact plaintiff, especially defendants' calling numbers and call detail records.

Now part of the problem here is -- is labeling. The defendants keep stating that they have produced the "call detail records". But what they're calling call detail records are missing -- they've deleted the most important information which is what time -- well, call detail records at a minimum normally provides the telephone number of the calling party, the telephone number of the called party, the date of the call, the time of the call, and the duration of the call.

The records defendants produced did not include records

of the time of the calls, the time the calls were made, and their duration, or the number they used to call -- to call from. So without that, that's -- without that we can't tell anything from the records and the defendants know that.

Our expert's unrebutted testimony as you can see from his affidavit says, that we need all that information to see if -- or at least that would be -- that may -- there's a -- there's a excellent chance that if they disclose that information that will reveal conclusively -- it could reveal conclusively that an ATBS was used.

Let me give you an example. This is an easy one. Let's say the records indicate that the bank made 60 phone calls to Mrs. Glassbrook in 60 seconds. Obviously no human could do that. But they've deleted the time they made the phone calls from the records that they produced, so we can't tell that.

That exclusion itself is revealing. Why would they delete it unless it would show something unfavorable to them? Let me get back on track here a little.

I -- I don't want to go into all the detail -- all the facts again in the brief, but Mrs. Glassbrook had 250 free calling minutes a month on her SafeLink phone. In the event that plaintiff exceeded 250 minutes in usage in any particular month she would purchase a phone card.

So keeping that usage under 250 minutes a month was very vital to the plaintiff because if she spent more than that

allotment, that means she had to spend cash that she needed for other parts of her family budget and, you know, she's a person of modest means and has two kids to support.

Plaintiff testified that when she received calls from the bank, she would sometimes she recalls clicking noises then also sometimes hear a pre-recorded message stating, please hold for an important message from the bank.

She testified that she would hold the line and wait while her scarce minutes expired. She further testified that the bank left illegal pre-recorded messages on her -- on her voice mail.

THE COURT: So, Mr. Honigman, do you allege that that introductory comment, please hold for an important message, is that a pre-recorded message that violates the law in your opinion?

MR. HONIGMAN: It does, Your Honor, yes. The TCPA says that you cannot use pre-recorded messages unless you have the consent of the called party even if an auto dialer isn't used.

Now of course it's hard to understand how or why a company would use a pre-recorded message in the absence of an auto dialer. Our expert has testified that he's never heard of such a instance.

Why would somebody from the bank manually dial the phone number and then when he heard Mrs. Glassbrook pick up the line

all of a sudden put on a pre-recorded message. Now of course he'd speak himself he wouldn't manually dial and leave a pre-recorded message.

So the fact that pre-recorded messages were heard by Mrs. Glassbrook and by the Renshaws also reveals that an auto dialer was used.

THE COURT: Did the Renshaws say that such a message was -- was part of the call that was made by the defendant to them?

MR. HONIGMAN: Yes. Yes, they testified that they received pre-recorded messages and had to wait on the line.

THE COURT: Yeah, but the specific message -- the specific message of please hold while a representative comes available or words to that effect.

MR. HONIGMAN: They didn't use those exact words, but words to that effect. They said that someone came -- and that a recording had them wait and -- for someone to come on. But they didn't use those exact identical words, but words to that effect.

THE COURT: And the fact that the --

THE COURT: And that's very similar by the way to the actual recording produced by the bank.

THE COURT: You believe that's similar to the recording produced by the bank?

MR. HONIGMAN: Similar not -- not identical, but

similar.

THE COURT: Well, but -- but the -- the -- as I would understand it, the -- the pre-recorded message that you're describing now would be at the front end of the conversation.

MR. HONIGMAN: Yes.

THE COURT: Where it would -- there would be an automatic dialer used arguably and once the phone was answered, the pre-recorded message would kick in and -- and request that the -- the person called stand by basically while the actual live person recognizes that somebody has answered the phone and then -- and then connects to that person and then contacts them for whatever purpose was associated with the call.

Whereas it seems to me what the -- what the defendants here have produced is a message that would be left on an answering machine. And I believe that the defendants assert that the only message that they would have left would be one left when the tone from an answering machine became apparent.

So that the -- the message is only left when -- when nobody answers the phone. And then it's -- it says this is somebody from the -- the defendant and please call this number or -- or words to that effect. So they're not really all that similar, are they in terms of what the defendant says their message was versus what you allege was used in this instance?

MR. HONIGMAN: No, I thought there was one that said to wait. But -- but of course even if the one they produced isn't the same, that doesn't mean that that's what happened.

We have three people who testify otherwise. Three out of three I would -- would add or 100% of the persons we've been able to identify who received phone calls from the defendant.

THE COURT: All right.

MR. HONIGMAN: You know, the -- the factual disputes at the heart of this lawsuit haven't really changed since day one. Based on detailed personal observation, plaintiff filed a complaint alleging that the defendant bank and its employees violated the TCPA by calling her cell phone using a -- a robo calling system and pre-recorded messages. And from day one the bank and its employees have disputed both the assertions and that factual dispute remains with us today.

THE COURT: Right. And -- and the -- the -- when you drill down here, the -- the question before us in this motion is in light of the factual assertions that the defendant has made that no robo dialing equipment was ever used to call the SafeLink phone of the plaintiff and -- and therefore there was no automatic dialing system used with respect to any communication to your client and that's the only system that the defendant maintained through which a pre-recorded message could be left.

Their records show that no such calls were ever made

during this period of time to the SafeLink phone. And -- and your response, which is the responding party in a summary judgment motion has to come forward with evidence that is -- a jury can reasonably find in her favor showing that that's contrary to what the defendant has asserted. And do you believe you've done that?

MR. HONIGMAN: Oh, definitely, yeah.

THE COURT: Okay. And so outline for me what the evidence is that you think meets that burden.

MR. HONIGMAN: Okay. Well, before I do that I would like to attack the defendants' evidence which they say are their records but what we've asked -- that's just -- what they're really giving us is what they claim are their records. That's why we don't want to go to physically inspect the phone or the dialing equipment, that has no value.

We want to -- we offered this at the beginning and the defendants refused. We want our expert to either be able to direct somebody else, or to personally go and I don't think you have to be physically present for this. I think it can be done electronically over the internet.

But if it has to be done in person, fine. But I'm quite sure it doesn't. To query their system to get the records we want, not the records that they -- they -- they created in response to our request.

They keep complaining about the fact that you know, we

didn't go and inspect it. Number one, how do we know that they even used the TouchStar system. That's another issue.

It's not undisputed that they used the TouchStar system, that's their claim. They could have -- they could have used any other automatic telephone dialing system.

THE COURT: Well, but --

MR. HONIGMAN: All the calls --

THE COURT: -- but is there -- is there any evidence that they didn't use that system? I mean --

MR. HONIGMAN: Oh, yes, there is. Let's put it this way. If they claim that TouchStar -- that if -- if we really -- if our expert could query TouchStar, which he has not been allowed to do, and pull records out of the TouchStar system that revealed that TouchStar was not used to call Mrs. Glassbrook and the Renshaws, yes, we would still have their testimony that they received calls that sounded like and had all the characteristics of auto dialing and that they heard pre-recorded messages.

That would suggest that they either -- the bank either had another automatic telephone dialing systems which was not uncommon several years ago or they still have it and they're just not revealing it.

With the phone records our expert should be able to tell that as a matter of fact. If we could only get these records, it -- it could well resolve everything.

THE COURT: And the records that you want, aren't those records from the phone companies?

MR. HONIGMAN: They could come from the -- the -- I prefer to get them from phone company if we could only get one sent, but it would be better to get the records from whatever automatic telephone dialing system the defendants will admit they have and compare those to the records from the phone company.

We can't get the records from the phone company without knowing what numbers they dialed out on and here's why. Even if we know all of the phone companies they employ, which we don't know, we only know a couple of them, this is a huge multi-billion dollar bank.

We need to know what lines they used to call delinquent customers on. How are we going to -- how are we going to be able to tell what are the appropriate calls without knowing what phone numbers they used. It would be an enormous -- it would be like finding a needle in a haystack according to our expert.

And again that testimony of our expert is uncontradicted. I don't understand what's so hard of giving us the phone numbers they called out on. That would solve so many problems.

THE COURT: That sort of raises the question which is I think part of the -- the motion here. And that is

whether the defendant somehow failed to comply with the previous order that I had entered requiring that they produce information.

And -- and I've given some thought to that and I -- I've -- I guess I've come to the conclusion and perhaps I missed the point in the previous hearing, motion to compel, but I was under the impression that what you needed from them were the numbers that they called in an attempt to contact the plaintiff, not the numbers they called from.

Because I thought that you had said that you would be able to figure that out by issuing subpoenas to the phone companies. And then you would be able to get that information. That -- that certainly was my impression.

And again maybe I missed the point. But that was just to clarify this issue. I -- I really don't think -- as long as the defendants produced the information associated with any of the phone numbers they called in an attempt to reach the plaintiff and the dates and times of those calls, then I think they've satisfied that quest.

Because I was certainly left with the impression that you could get the call data information from the phone company. And --

MR. HONIGMAN: Well, I'll take responsibility for that, for misunderstanding. I may be not being clear enough. I thought based on what you said at the hearing that you had

-- you were ordering them to produce not only the numbers of Mrs. Glassbrook that were called, but also the numbers they called out on which we also need. We need -- we need both really.

Although, you know, we -- we presumably know Mrs. Glassbrook's phone numbers. However, there's -- there's another explanation that might -- another set of facts that might explain why it is that the defendants -- maybe they do sincerely think that they didn't call Mrs. Grassbrook's cell phone and yet Mrs. Glassbrook and the Renshaws are telling the truth, that they received such phone calls.

In the records -- in their records they list an old phone number of Mrs. Glassbrook that she had when she was married previously and --

THE COURT: The 33 number?

MR. HONIGMAN: Yes. Maybe they were -- maybe they're -- maybe the bank's computer system was misallocating the phone calls to Mrs. Glassbrook to that number or to some other number. There's no way to tell without looking at the records.

But that would -- that's one explanation that wouldn't make -- that doesn't require that someone not be telling the truth here. Maybe that's what happened.

THE COURT: All right. All right.

MR. HONIGMAN: As you yourself noted, the defendants

kind of practice manual for their collection efforts, states that their routine practice is to use robo dialing to call delinquent customers from the 5th through the 60th day of delinquency.

Why they wouldn't do that with Mrs. Glassbrook, I'm not sure. But -- but that's evidence that supports an inference that they followed their routine practice in Mrs. Glassbrook's case.

They sure made an awful lot of calls to her. I don't know, it's hard to believe that in her case they uniquely failed to follow their guidelines. That -- that doesn't make sense.

I haven't heard any explanation about why they would -- would do that. In these cases, Your Honor, all -- the defendants almost always have a monopoly over the relevant records and the plaintiff needs to get those.

Otherwise all they're going to have to rely on is their experience -- their recounted experience of their phone call with the wrongfully calling party. What -- what else would they have?

THE COURT: So -- so what records do you believe that they have that they -- you have asked for that they have not produced?

MR. HONIGMAN: The phone numbers they called out on to Mrs. Glassbrook and other consumers. And the time and

duration of those phone calls. That's the critical information that's needed for an expert to look at it and in the patterns of the calls and the times and durations an expert can form an opinion about whether or not an auto dialer was used.

THE COURT: And you've asked for that information?

MR. HONIGMAN: We've been asking for that from day -- day one, yes. That is the definition of a call detail record. It's -- it's on your own phone bills, Your Honor.

If you look at your phone bill it will say when you made the phone call and the duration of the phone call. It's just a routine record. They are deleting that on purpose. That would normally come with the record. There's nothing unusual about that kind of information.

That -- that deletion itself suggests something fishy and is itself an omission -- it's self evidence, I would argue. We might have been able to settle this case, I don't know, I believe these three people are telling the truth.

But if we had have gotten these records right away we would either, if we saw there was no support in the records as I told Tom many times and his colleagues, we would drop the lawsuit ourselves probably.

So now it's possible that their calling records could be consistent with robo calling or not robo calling. There can be a gray area. They testified that they varied the intensity

of their phone calling campaigns.

In other words sometimes they would pick up the pace of the robo calling, and sometimes they'd slow it down. So if -- the really revealing data is the speed and concentration of the calls in a small or large period of time.

Is it possible a human could do that, or does that pattern of calling in certain time periods reveal that it must have been an auto dialer. But they didn't give us that information.

We could get that from the phone company if they give us their outgoing phone number so we know if they used to call delinquent customers. So we know, you know, what data to look at. Otherwise it would be (Inaudible) and we'd just be guessing.

We might be looking at numbers they used to, you know, market -- market their products or something. And our expert testified. He's been an expert witness in about 50 cases. He has never seen these kind of records not produced in a TCPA proceeding. They're -- they're just customarily produced.

In some of the cases that the defendants rely on for the proposition that summary judgment should be granted, in a couple of the cases it didn't seem as though the plaintiffs realized they needed those records and they didn't even ask for them. And if that was one of the reasons I believe that they -- a couple of them, not all of them, lost on summary

judgment.

As you noted in some of the cases the plaintiff's own records contradicted their -- their assertion of -- of illegal phone calls. So the Courts faulted them for not asking for those records. And apparently the cases went on for a long time. I don't know, I think one might have been a -- a pro se case even, so --

THE COURT: Mr. Honigman, do you believe that as the record stands at this moment that the evidence supports sufficiently the plaintiff's position that the jury could reasonably find in the plaintiff's favor? Or as Mr. Schehr suggests, that you acknowledge by the 56(b) affidavit that you don't currently have such information or evidence in the record, but need whatever else is requested in the 56(b) affidavit?

MR. HONIGMAN: No, we don't, Your Honor. That's, you know, a standard ploy to claim and I worried about that when we asked for the information that that would imply that we think we need it in order to escape summary judgment.

We need it. Of course it would -- we think it would help our case. And we need it to try the case. But there's plenty of evidence here, it's just one person's -- it's the bank's employee's word. And the records that they've created which we have no idea if they really reflect reality.

And they have plenty of motive to fudge things. Or maybe

they don't understand what they're doing. And it's a dispute between them, their word and three consumers' words. It's up to the fact finder to decide who to believe.

There's nothing inconsistent or unbelievable about what -- what the -- Mrs. Glassbrook or the Renshaws say. It -- and that's another thing that would be useful to talk -- remember, we -- we were only -- I don't -- we wrote in the brief about why we -- how we got a hold of the Renshaws.

When the defendants wouldn't give us, when it became apparent they weren't going to give us the records we wanted, we said well, we better, you know, let's go out and try to get some corroborating evidence because this is standardized dialing. They must be doing the same thing to other people.

So we -- we scoured the Court records in Geneses County and maybe a couple other counties, I -- I -- I'm not sure. And came up with about 80 names of people who had their mortgages foreclosed or had some kind of litigation with the bank over their -- their mortgage payments. And sent letters to them.

And because these people are losing their homes, a huge number of the, you know, letters came back unopened and there was no forwarding address. We -- we only received three responses.

Of the three, one was from -- we -- when we talked to the person it turned out they had a land line. So as you noted,

you're allowed to call land lines.

And that left Mr. and Mrs. Renshaw who stated that their cell phone was called. And told us -- told us about -- had an -- an experience remarkably similar to that of Mrs. -- Mrs. Glassbrook.

So we have a three person sample and all three people say, you know, basically the same thing. I believe this -- we could also go a long way towards finding out who is telling the truth, or whose story is accurate. Mistakes are being made inadvertently here by sampling some more people who were called.

It doesn't have to be everyone. If I remember my statistics right, I think you need about 30, 35 people to have a statistically valid sample. So that would be more -- another way to determine who's -- who's right here.

If -- if the same 100% percent percentage says the same thing that Mr. and Mrs. Renshaw and Mrs. Glassbrook say, that would be pretty conclusive that that's what happened. It's hard to believe that that many people are going to make up the same story if it didn't happen.

But once again the defendants don't want to give us that. This refusal to give stuff that's clearly probative is in itself infinitely revealing I believe.

THE COURT: All right. Does that conclude your comments, Mr. Honigman?

MR. HONIGMAN: It does, Your Honor. Although I -- I would point out that there are cases cited in our brief where it's -- it's enough that it gets by summary judgment that many Courts have held that it's exactly the kind of dispute you have here. So --

THE COURT: All right. Thank you. We're going to give Mr. Schehr an opportunity for rebuttal. And then we'll ask you to argue your motion for leave to amend the complaint. Mr Schehr.

MR. SCHEHR: Thank you, Your Honor. Your Honor, I think Rule 56 is designed precisely for this situation.

I have a lot of points that I wanted to address in no particular order. The last point Mr. Honigman made was about sampling people that could potentially be part of the class. I think Your Honor's already decided that during the scheduling conference on March 10.

The Court said that we're going to determine whether or not Sharon Glassbrook has a claim before we decide to go forward with any class discovery and we're here on Rule 56 to establish that Sharon Glassbrook does not have a claim.

As I said before, I think the Renshaws' factual situation is not relevant to what may have happened to Mrs. Glassbrook, but I would point out that at Page 38 of Stephanie Renshaw's deposition, there was the following colloquy.

Question, it would say please hold for an important

message from First National Bank? Answer, yeah. And then it would say, this is a debt, trying to collect for a debt. If this is Joseph Renshaw, please press one. If not, press two to take a message.

Question, so what happened if you'd press one? Answer, it would take you to a live person.

Question, and then a live person would talk to either you or your husband about trying to make your account current? Answer, yes, sir.

Question, that was the pre-recorded message that you received? Answer, yes, sir.

Question, do you recall any other pre-recorded messages other than that? Answer, no, sir.

I would also note that the pre-recorded message is alleged to have the name of the borrower in it. I don't know how it could be pre-recorded if the borrower's name was in -- in the message. But in any event, that is a different pre-recorded message than Sharon Glassbrook alleged, but it doesn't -- I don't want that to take away from my fundamental point which is what happened to the Renshaws is a separate claim, it's a separate case, and it doesn't have anything to do with Sharon Glassbrook.

THE COURT: Well, I mean if -- if the -- if everything had lined up the same, that is the Renshaws testified about something that was a -- a message that was

virtually identical to what Mrs. Glassbrook had testified about, wouldn't -- wouldn't you concede that there would be some corroboration that such a message was used?

MR. SCHEHR: Well, the answer is no, Your Honor. The -- the fact is that the message was not used. There's no proof whatsoever from our system that this message could even be used in any context.

Our system is technologically incapable of leaving that message. And it was available for inspection and they've refused to take a look at it to see if we could do that. And now they're saying well, there's something fishy going on, or there could be records out there.

And I heard Mr. Honigman say at one point we've refused to allow their expert to inspect the system. Nothing could be farther from the truth. It's in the Court's order that they had the right to inspect the system and they -- they did not. They chose not to, Your Honor, and as a result you cannot come on a Rule 56 motion and say there's something fishy out there. That's not sufficient to carry the burden when they had the right to do that and chose not to do that.

THE COURT: Okay.

MR. HONIGMAN: Well, Your Honor, can I add one thing?

THE COURT: Not right now, Mr. Honigman.

MR. HONIGMAN: Okay.

MR. SCHEHR: You asked Mr. Honigman what records exist that haven't been produced. I don't know that you received a clear answer to that question. There was clearly a motion to compel discovery that was filed. We dealt with that on June 25th at the hearing. It was granted in part and denied in part.

We produced a document that is attached as Exhibit 2 to Mr. Honigman's brief which I believe complies precisely with the Court's order. Sets forth the number that was called and the date and time of the phone call that was made.

Nothing else was requested. On that motion to compel I'm not aware of any deficient discovery response that exists on this record. Moreover I will note that during that hearing the Court indicated that since we had recordings of the calls, although Mr. Honigman had not asked for them, that you thought it might be wise for us to produce them.

We did produce them to Mr. Honigman. He has recordings of all of the calls. So to the extent he wants to know information about the duration of the calls which was not the subject of the motion to compel, he has the actual recordings set forth.

THE COURT: What -- what was deleted from those records?

MR. SCHEHR: There's nothing deleted. What's redacted, Your Honor, is the phone numbers. Because those are

not her phone numbers. We did -- we did not redact when it was her phone number. But the numbers where we redacted were not her phone number. And they're not alleged to have been her phone number.

So we didn't delete anything, we just didn't disclose the full phone number because she's not alleged to have had any phone numbers other than those that she previously disclosed. Now we're hearing about this 33 number which is one of the numbers that was redacted, but that's not the same number, number one. And number two, she had that number back in 2006, 2007 well outside the statute of limitations.

THE COURT: So -- so there are in looking at this exhibit, there are -- there are what appear to be 33 numbers in there, at least there's a 33 that appears at the far right hand column. And -- and that's not to Ms. Glassbrook's 33 number?

MR. SCHEHR: Correct. It's to a different number.

THE COURT: Just coincidentally has 33 at the end?

MR. SCHEHR: Coincidentally has 33 at the end. Different number. Since this is a class action we don't want to encourage the plaintiffs to find additional parties, we redacted the number. And again it's not alleged to have been her number during the relevant time frame.

THE COURT: So those numbers and it's 810-627-8848 that that is the -- the number that was called in an attempt

to reach Ms. Glassbrook?

MR. SCHEHR: That was her number at one point but she lost that -- that number before the December 6th, 2010 time frame set forth in the Court's order. Nevertheless we did try to call it and therefore disclosed it in response to the Court's order. But she didn't own that phone number at the time. I think it's undisputed that the only phone number she had during the relevant time period is 1158, SafeLink phone.

THE COURT: But -- but you attempted to call that number even though it was not her -- a phone number that she was using?

MR. SCHEHR: We didn't know that she lost the --

THE COURT: Right.

MR. SCHEHR: -- the right to use that number. So yes, the -- the records show that the 8848 number was called during that time frame. But since she didn't own the phone, she doesn't have standing to raise any argument relating to it.

THE COURT: Okay.

MR. SCHEHR: Okay. So I'm not sure that there is a specific document request, or interrogatory, or anything that we haven't responded to based upon Mr. Honigman's -- with his -- his argument.

I will tell you that we have no records showing the number from which the call was made. And I've got that in a

declaration. Bowman, Paragraph 5, defendants have no record showing the telephone number from which the call was placed.

And on this concept of call detail records, the Court is exactly right. That during the transcript -- during the hearing on the motion to compel discovery on June 25th, the transcript Page 33 states that the Court said, the call detail information, Mr. Honigman says he will get from the phone company. So that's not really an issue for this.

THE COURT: All right. Does that conclude your comments? Mr. Honigman had something else to say and I'll give him the opportunity to do that. And of course I'll give you the opportunity to respond to whatever he wants to say.

MR. SCHEHR: I just had one or two additional comments, Your Honor. First, Mr. Honigman indicated that my client is a multi-billion dollar bank. I believe that's what he said. That's not true.

It's a small family owned bank with three branches based in East Lansing. This is a very significant case for them, a putative class action under the Telephone Consumer Protection Act which they want to have statutory damages relating to calls that were frankly never made to the class representative, Mrs. Glassbrook.

And I would ask the Court to determine as you indicated on March 10 whether or not Sharon Glassbrook has a claim. And if she does not have a claim, then I would ask the Court to

dismiss the case on Rule 56. We'll deal with the Renshaws separately.

But they've had an opportunity to conduct discovery. They issued subpoenas. They took five depositions of our witnesses. They had the right to inspect our system. We've done everything we've been asked to do. We've produced all the information that's been requested.

Have to have more than metaphysical doubt. There has to be more than a scintilla of evidence. There has to be more than something fishy in order for a plaintiff to withstand summary judgment. The plaintiff hasn't met her burden here, Your Honor.

THE COURT: All right. Now, Mr. Honigman, you wanted to add something?

MR. HONIGMAN: Yes. Number one, you asked what was deleted.

And Mr. Schehr said certain phone numbers were redacted. But I'm not -- what -- what was deleted was the time of the calls, and their duration, and the outgoing phone numbers the calls were made on. That's what was deleted along with some redacted stuff.

Now Mr. Schehr claims that that 33 number is just a "coincidence". Your Honor, we're entitled to all inferences in our favor for purposes of summary judgment. So coincidence is not an inference that the Court should make for purposes of

summary judgment anyway. The fact finder can reach that conclusion, but not a Court for purposes of summary judgment.

We -- we did -- we have never asked to physically inspect the system. We've said all along we do not want to physically inspect it. We want to query the system.

Our expert in an affidavit is again it is uncontradicted states that we have -- we must query the system to get the information we need. And that the pattern of calling revealed by such a query is the most probative evidence in these kind of cases.

And there is -- there is no evidence that disputes -- disputes that. That that's the most important evidence typically in a case like this.

We have presented all the evidence that a plaintiff could ever have unless the bank had produced the -- the records that we requested. Which is their own experience of the phone calls.

So if there's a dispute and the -- the -- the defendant doesn't admit that they did what the -- what the called people say they heard, there's a factual dispute. We have a bunch of employees who are loyal to their bank and they're all saying one thing.

I mean it was kind of a -- we have deposed five people but the records are way more important than that. And we do have records from the bank that contradict what they say.

Their guide says that they call routinely from the 5th to the 60th day using a robo caller.

And there was the testimony also of -- oh, my God, my mind's a blank now. The first gentleman we deposed which -- I'm sorry, he was deposed in the State Court proceeding. I can't believe I can't think of his name now.

But he's a -- he's an employee of the bank. A high level employee. And he -- he stated that the bank does robo call its customers who are delinquent and that that's what happened to Mrs. Glassbrook. She was robo called.

Now he kind of came back later and tried to say he didn't know, or he wasn't sure and he kind of equivocated a little subsequently, but and that -- that testimony was given before the bank realized that it might be liable for illegal phone calls. That was in the State Court proceeding that that testimony was given in a deposition.

And that State Court proceeding had nothing to do with illegal phone calls. It was about Mrs. Glassbrook trying to save her home from being foreclosed on and matters related to that.

So when they did have -- when the bank employee did have an incentive to misrepresent or kind of avoid saying things, they said she was robo called. That was one of the reasons we filed this suit.

THE COURT: Is that information in this record?

MR. HONIGMAN: It is. He was -- I can't think of -- Tom, maybe you can help me out. What was that gentleman's name again?

THE COURT: Mr. Schehr, do you know?

MR. SCHEHR: Your Honor, I believe the person Mr. Honigman is referring to is Mr. Browning.

MR. HONIGMAN: Yeah. Mr. Browning, yup.

MR. SCHEHR: There are -- Mr. Honigman is not even close to accurately citing what Mr. Browning said.

Number one, that was in the State Court proceeding and it's not part of this record. Number two, he never said the bank robo called anybody. Those words have not come out of his mouth.

MR. HONIGMAN: No, I didn't mean those exact words. He had automatically dialed using the computer something equivalent to robo calling. He did not use that word.

MR. SCHEHR: Your Honor, there's -- there's no dispute in this case that the TouchStar dialer was used on occasion to call borrowers. That's not the issue. The issue is whether Sharon Glassbrook received a call from TouchStar.

MR. HONIGMAN: No, not from TouchStar. From any automatic telephone dialing system.

MR. SCHEHR: TouchStar is the only alleged automatic telephone dialing system here.

MR. HONIGMAN: No, that's not the -- we allege that

Mrs. Glassbrook was called by an automatic telephone dialing system, not by TouchStar. The bank claims that that's the only system they have.

THE COURT: And -- and the evidence that you have to the contrary is -- is Ms. Glassbrook's statements that she was called by something which appeared to be a robo or automatic dialer?

MR. HONIGMAN: Yes. And the Renshaws' statements also to that effect. And some of the records of the defendant that indicate that that's what they routinely do.

Pattern and practice evidence is -- is powerful. Why would a company just doing routine standardized dialing depart from its standard practice for purposes of summary judgment we're entitled to an inference that they followed their routine standard practice which comports with her reported experience.

The only evidence contrary is really statements from the bank's employees. They're denying what we're claiming. That's what this boils down to. Their written records are merely their claims reduced to writing because they created those records.

We have no idea if those are the real records. And for purposes of summary judgment, we're entitled to all favorable inferences in our favor. And there's a lot of evidence that --

THE COURT: But -- but there's a difference between drawing an inference in favor of the plaintiff and -- and simply discrediting an assertion made by an opposing party that certain facts took place.

I mean it may well be that there is some bias that might be associated with those statements, but that's no real different than the bias that might be associated with the plaintiff's statements. So I mean --

MR. HONIGMAN: True.

THE COURT: You sort of have to take the facts at -- at face value and decide those that are presented by the -- the plaintiff whether they amount here to a sufficient standard to satisfy the burden of proof under the summary judgment standards.

The defendant has come forward with evidence and you may -- you may argue that that's not sufficient to trigger an obligation on the part of a plaintiff to -- to make a showing contrary to that, but that's really the -- the nub of the -- the issue here.

So in any event we have spent some time on this this morning and I -- I am afraid that I don't have the rest of the day to devote to -- to the hearing. So you'll have to conclude your comments, Mr. Honigman fairly quickly and I'll -- I'll give Mr. Schehr the last word and then we'll move on to the motion to -- for leave to amend. So is there anything

else that you would like to say on this motion, Mr. Honigman?

MR. HONIGMAN: No, I think I'd just be repeating myself at this point so I'll leave it at that.

THE COURT: All right. Mr. Schehr, any final words that you would care to make?

MR. SCHEHR: Your Honor, number one, Mr. Honigman has subpoenaed TouchStar's records so he's got those as well. Number two, it is not all favorable inferences. That's not the standard under Rule 56, it's reasonable inferences should be made in a light favorable to the non-moving party. It's not every favorable instance, every fishy argument that could be raised by plaintiff's counsel in responding to a motion for summary judgment. He's got a burden and he hasn't met it. Mrs. Glassbrook's claim should be dismissed. Thank you.

THE COURT: All right. So that concludes the argument then on the motion for summary judgment.

Mr. Honigman, the motion for leave to amend is your motion, so proceed when you're ready, please.

MR. HONIGMAN: Okay. Okay. Well, Your Honor, we've -- let me start out by saying that we warned defendants' counsel at the very first status conference that plaintiff's claims had been confirmed by initial recipients of illegal phone calls and that plaintiff might seek to add these additional recipients as plaintiffs and class representatives.

Initially, we were reluctant to reveal the names of the

additional plaintiffs because number one, we didn't want to risk exposing vulnerable people of modest means to retaliation by a bank holding a mortgage on their home. And since we couldn't be sure that the -- number two, we couldn't be sure that the bankruptcy trustee and the Bankruptcy Court would grant us permission to proceed on behalf of the bankruptcy estate.

And number three, at the time we were expecting calling records that are normally disclosed during TCPA discovery might render their testimony unnecessary although not unhelpful.

So those are the reasons we -- we held off doing it for a while. But we believe we proceeded not only reasonably and fairly, but generously to our adversaries by giving them a warning we weren't required to give to prevent them from being surprised while at the same time protecting vulnerable witnesses and potential litigants from retribution by, you know, angry defendants.

And indeed our concerns about harassment and retribution from defendants has been borne out by among other things defendants' recent filing harassing Mrs. Glassbrook by seeking to convert her Chapter 13 case to a Chapter 7 case. And I take it trying to recover for themselves the statutory damages they may have to pay to Mrs. Glassbrook because of their own wrongdoing.

Furthermore, the Magistrate didn't -- you -- you didn't issue an order granting in part and denying in part plaintiff's motion to compel the production of critical documents that might make the Renshaws' participation less necessary until June 25th of this year.

And further complicating matters as we've discussed, the plaintiff and defendants interpreted that -- that order differently. In fact it wasn't clear until late July.

On July 16th, believing that your order compelled the disclosure of documents, it might make the Renshaws' participation less necessary and hoping to avoid the expense of a contested motion to add the Renshaws, I -- I asked defendants' counsel if they'd be producing any more documents and that -- that request is attached as an exhibit to our motion to amend.

Finally, on July 25th, defendants' counsel responded that they would not be producing the "four documents" or any documents for that matter. And as -- as Tom quoted from you earlier it was at that point that the balance tipped in favor and the Renshaws, even though that meant more expense, it was a very expensive proceeding that doesn't seem to be advancing very -- very far in terms of discovering stuff.

Defendants themselves identify one of the reasons that plaintiff didn't move to amend the -- to add the Renshaws sooner because they're in bankruptcy. And a motion to

authorize employment of -- of us wasn't granted until June 20th.

And we didn't really learn that the Bankruptcy Court had granted that motion until sometime in July. Defendants complained that the current motion could have been brought before discovery closed. But we don't seek any additional discovery as a result of adding or not adding the Renshaws.

We seek the same discovery whether the Renshaws are added or whether the Renshaws are not added. We have requested from day one and continue to request the call detail records of people called by the bank's collection department, that's nothing new.

Defendants complained that if plaintiff is hoping to use the Renshaw -- defendants complained that plaintiffs are hoping to use the Renshaws as a in their words backup plan, that that's misguided. We could do that even if the Renshaws are not added to this suit.

We don't derive any unfair, to use the defendants' words, tactical advantage from adding the Renshaws to this case. The defendants characterize the addition of the Renshaws as an unfair tactical benefit, but the only tactical benefit to plaintiff and the class is the efficient litigation of virtually identical claims in one lawsuit instead of costly multiple duplicative lawsuits.

If defendants want to conduct additional minor discovery,

that does not constitute prejudice sufficient to deny the motion for leave to amend. Defendants have already deposed the Renshaws precisely because we told them we would be adding them, or that we might add them. And they have not -- and we might try to add them, I should say.

And they have not identified any substantial discovery that they may need to prepare a defense to this class action. Of course not because defendants control access to most of the critical documents relevant to the dispositive issues in this case. Whether defendants made calls and texts to plaintiffs and the Renshaws from using an automatic dialing system and whether or not they left -- used artificial or pre-recorded messages.

Of course the defendants do not want to resolve, you know, any -- any issues on the merits. They want to infinitely delay determinations on the merits of the claims but it would be good to move forward.

The -- the defendants argued at some length that our motion is an improper attempt to substitute a class representative before class certification. That -- that has no merit.

First, we're -- we're requesting an amendment to add putative class representatives, not substitute class representatives. Secondly, and more importantly, Courts regularly grant motions for leave to amend to add class

representatives.

I mean we have some cases cited in our brief but let me just quote from the manual for complex litigation. "Later replacement of a class representative may become necessary if for example the representative's individual claim has been mooted or otherwise significantly altered". And it goes on with other reasons for doing so.

As to -- as described in our brief, the cases defendants rely upon, are we think distinguishable and inapplicable. I -- I won't go into that, but if you have any questions about that, I'm glad to answer them.

And that's -- I think that's -- we wanted -- well, let me just conclude by saying that we want to add the Renshaws because -- for a couple reasons here. Number one, adding them will allow Mrs. Glassbrook to share the burden with someone about the -- prosecuting this action.

And it will protect her we hope a little bit. Because the bank won't be able to focus its -- like when they -- its harassing efforts on her if there's any more of it. I hope not, but you know, she's in a tough spot. She's a single mother with two kids who doesn't have a lot of money and the defendants really scared her when they tried to convert her bankruptcy proceeding to a Chapter 7 proceeding.

So she has three putative class representatives that that gives Mrs. Glassbrook a little comfort in that the bank won't

be able to focus its -- its -- its activities at her. Plus the Renshaws' experience is substantially similar to plaintiff's and we assume the rest of the class.

Their testimony will corroborate the allegations of Mrs. Glassbrook. And they can protect -- and we're trying to protect the class just by providing additional class representatives who can act on behalf of the class. Those are our reasons for trying to add the Renshaws.

THE COURT: All right. Thank you. Mr. -- Mr. Schehr, your response?

MR. SCHEHR: Thank you, Your Honor. Your Honor, we would ask that this motion be held in abeyance pending a decision on the motion for summary judgment. If the motion for summary judgment is granted, then this motion for leave to amend should be denied as moot.

Plaintiff does not seek to clarify Mrs. Glassbrook's claim, but they're rather seeking to add new parties as Mr. Honigman acknowledged in his argument. The Renshaws can file their own complaint and it will rise or fall on its own merit.

We believe there is a tactical advantage to plaintiff's decision to attempt to add the Renshaws at this point, especially in light of the fact that it wasn't -- they didn't seek to add them until after they responded to our motion for summary judgment.

One, we think it's an admission that Glassbrook's claim

can't withstand summary judgment. But number two, there is an issue regarding tolling, Your Honor. There is no reason that Sharon -- that Renshaw could not file their own complaint now. But that would start a new statute of limitations period.

Sharon Glassbrook filed her complaint in January of '13. They undoubtedly seek to have the class include everybody who was called in violation of the statute back to 2009 within the four year statute of limitations. If she didn't file her complaint until now it would be a different limitations period and I will tell the Court that FNBA has changed its dialing methods recently and it no longer uses the dialer.

So that is why they want to add Renshaw to this complaint as opposed to file a new complaint. They want to tack that to January 2009 limitations period. And we think that that is procedurally improper.

In addition, this is a putative class action as Mr. Honigman noted. Class actions are notorious for plaintiffs and their attorney's fees. They undoubtedly would want to capture attorney's fees relating to Glassbrook's claim even though it's dismissed.

They could say well, we just substituted the class rep and we're entitled to attorney's fees while we litigated the Glassbrook case. We think that that is a tactical advantage that they seek to -- to take advantage of here by filing a motion for leave to amend rather than simply exercising their

right to go down the hall and file a new complaint on behalf of Renshaw. So there clearly is a tactical advantage and that's what's going on behind the scenes here.

In addition, Your Honor, as we pointed out in response to Mr. Honigman's motion, they haven't cited any of the Federal Rules of Civil Procedure that would govern this motion. This motion is governed by Rule 16.

Rule 16 requires that there be good cause to amend the scheduling order. We're not in a world where we're talking about Rule 15. This is Rule 16. We had a Rule 16 conference before the Court on March 10. On March 11, the Court issued a very detailed scheduling order.

There was no request on March 10 or at any time before then to amend the pleadings. There was nothing in the Rule 26(f) report about amending the pleadings. And the pleadings therefore were locked when the Court issued the scheduling order on March 11th.

And the authority that I have for that position is a published 6th Circuit case called Leary, Your Honor. The 6th Circuit precedent says that pleadings are fixed once the Court issues a scheduling order and which the Court did here on March 11th.

The Court in that case discussed at length the interplay between Rule 16 and Rule 15 and held that after the Court issues a scheduling order consistent with Rule 16, that Rule

16 good cause standard governs.

So let's look at Mr. Honigman's motion in light of that standard. Has he established good cause? Well, he's known about the Renshaws since October, November of 2013. The Renshaws wanted to file suit certainly by early 2014. They were not disclosed at that time and certainly did not file suit at that time.

We went through discovery with Sharon Glassbrook. We've produced all of our records. They've subpoenaed TouchStar, they've subpoenaed phone records. They've taken depositions of our corporate representatives, depositions of our IT people, and we filed a dispositive motion on July 11th laying out why there was no basis for a claim brought by Mrs. Glassbrook.

Only after they filed their response to our motion for summary judgment on August 4th did they seek leave to amend on August 7th. There has been no excuse offered for that delay. Near as I can tell, they apparently at one point did not want to file suit on behalf of Renshaw, but have chosen to do so now in an effort to get more discovery to resurrect Sharon Glassbrook's claim. I don't think that that is good cause under Rule 16.

In addition, under Rule 16 the law is clear that defendants need not show any prejudice as a result of the motion for leave to amend although my client would be severely

prejudiced for the reasons I talked about earlier relating to tolling and attorney's fees.

Another Federal Rule of Civil Procedure that governs this motion is Rule 20. This is a motion to add parties, this isn't a motion to add claims for Sharon Glassbrook, or clarify a claim that she had previously stated in her original complaint.

What they're trying to do is add parties. Rule 20 says that the -- the new parties have to have a claim that arises out of the same transaction or occurrence. As we said before I'm not going to go through this in detail.

Whatever happened with the Renshaws in their phone calls are separate transactions and occurrences from the calls that were made to Sharon Glassbrook. Renshaws' claim will rise or fall based upon its own merit and has nothing to do with -- with Sharon Glassbrook.

Finally Judge, even if Rule 15 were to apply, and I don't think that it does, the Court would go through the same standard with regard to bad faith and dilatory motive that the Court is familiar with. I think I've already laid out why that's the case.

In terms of prejudice, I've got 6th Circuit authority that I've cited in my brief. I think it's the Duggins case and there are other cases that establish that after filing a motion for summary judgment when your opponent comes forth

with a motion for leave to amend, there is really per se prejudice.

You've gone through discovery, you've produced witnesses, and as a result the Court can basically find prejudice just because of the fact that they filed their motion for leave to amend after discovery.

If the Renshaws were added to this case it would undoubtedly reopen discovery. That's the basis and motivation for Mr. Honigman to add the Renshaws here. They would probably want to re-depose witnesses of FNBA who have already been produced. They'd want to subpoena additional records.

THE COURT: I heard him say that there was no additional discovery that he would seek beyond whatever else he's currently seeking. So that seems to be suggesting that those things that you've just identified would not be things that he would be asking for. Do you think I misunderstood him?

MR. SCHEHR: That is not what I picked up from his argument, Your Honor. I believe that the basis and motivation to add the Renshaws is to obtain more discovery. He's saying we didn't produce something. I don't know what that is. I don't think he's identified that, but presumably whatever we didn't produce he's going to want to try to obtain a production of. And I don't -- I didn't hear him waive any right to depose additional witnesses of FNBA or otherwise.

In addition I would want to depose the Renshaws. When I deposed them we did not have their phone records and -- and whatnot up front because they were not parties to the case. They were simply witnesses and there was no motion for leave to amend at that point.

And as Mr. Honigman himself has said, they hadn't decided at that point whether to add them. So we didn't go into that level of detail.

And I guess the last point I want to make, Your Honor, is -- is it fair for a plaintiff just to substitute putative class representatives in seriatim. He had one putative rep. Her claim lacks merit then you can just bring in another one.

I think there's case law and I've cited in our brief is an accurate case and other cases that establish that that's not an appropriate way to proceed under the Federal Rules of Civil Procedure.

If Renshaw has her own claim, then she can file her own complaint. He should not be allowed to substitute plaintiffs in when it's determined that the original plaintiff has a claim that has no merit.

THE COURT: Okay.

MR. SCHEHR: Okay. Thank you, Your Honor.

THE COURT: Thank you for your comments. Mr. Honigman, any reply that you'd care to make?

MR. HONIGMAN: I would. You understood me

correctly, Your Honor. We do not need any additional discovery because of the addition of the Renshaws beyond that which we're already asking for.

Number two, you know, of course the defendants want -- they always want plaintiffs in the class action to bring individual cases. Dozens, hundreds, or thousands because they can't afford to do it. They can only gain entrance to the courtroom in a class action.

So is there an advantage to a class of injured persons to have a class action? Yes. But it has nothing to do with our personal attorney's fees. We're doing this on a contingency fee basis. They're -- they're not going to, you know, be -- be paying that.

And attorneys can't afford to -- to bring these kinds of cases for consumers unless they aggregate the claims. And of course wrongdoing defendants like that, but -- but it's not right. That's one of the purposes of a class action, to let people of modest means have a day in Court. A day they cannot afford without the aggregation of their claims with others in similar circumstances.

The incentives are definitely different for defendants and plaintiffs in a class action and for their respective counsel. Defense counsel gets paid by the hour so they can stall, they can split the cases into multiple proceedings. It's to their advantage to proceed inefficiently in some sense

anyway.

It's to plaintiff's advantage to proceed efficiently. It's expensive to litigate. It's risky. It's tiring for the plaintiff. It's emotionally draining for them. They want to get things done as quickly and efficiently as possible.

So in those senses it is to our advantage to aggregate claims, to have multiple plaintiffs assert their claims in one proceeding rather than multiple separate proceedings basically stating the same repetitive claim over and over again. And it's more efficient for the Court, it doesn't waste their resources to -- to aggregate claims. So that would be my response to Mr. Schehr's comments. Thank you.

THE COURT: Okay. Both motions are taken under advisement. I will not be rendering a decision today on these matters. So thank you counsel for your arguments. I hope you feel better, Mr. Honigman.

MR. HONIGMAN: Thank you.

THE COURT: So we'll close the record. Thank you very much and have a good day.

MR. SCHEHR: Thank you, Your Honor.

THE CLERK: All rise. Court is in recess.

(Court Adjourned at 10:44 a.m.)

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

s/Deborah L. Kremlick, CER-4872 Dated: 11-7-14